



Commonwealth of Massachusetts State Ethics Commission

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SUFFOLK, ss.

**COMMISSION ADJUDICATORY
DOCKET NO. 589**

IN THE MATTER OF KEVIN HAYES

DISPOSITION AGREEMENT

The State Ethics Commission ("Commission") and Kevin Hayes ("Hayes") enter into this Disposition Agreement pursuant to §5 of the Commission's Enforcement Procedures. This Agreement constitutes a consented to final order enforceable in the Superior Court pursuant to G.L. c. 268B, §4(j). On December 16, 1998, the Commission initiated, pursuant to G.L. c. 268B, §4(a), a preliminary inquiry into possible violations of the conflict of interest law by Hayes. The Commission concluded that inquiry, and on April 22, 1999, found reasonable cause to believe that Hayes violated G.L. c. 268A, §23(b)(2).

The Commission and Hayes now agree to the following findings of fact and conclusions of law:

1. From 1988 until the present, Hayes has served on the Board of Selectman ("BOS") in the Town of Spencer. As such, he is a municipal employee within the meaning of G.L. c. 268A, §1 of the conflict of interest law.

2. The BOS acts as the police commissioners. Acting as police commissioners, the BOS appoints the police chief and each individual police officer based on the police chief's recommendation, and holds disciplinary hearings as needed.

3. On August 25, 1998, Spencer Police Officer David Bera ("Officer Bera") observed Hayes speeding in his car. Officer Bera followed Hayes and paced his speed. Officer Bera activated the radar gun which showed that Hayes was traveling 50 MPH in a 35 MPH zone. Hayes entered a 25 MPH zone and did not slow down. Officer Bera activated his radar gun again and clocked Hayes going 47 MPH in a 25 MPH zone.

4. Officer Bera pulled Hayes over for speeding and asked Hayes for his license and registration. Hayes said, "I guess you don't know who I am. I am a selectman in this town. My name is Kevin Hayes." Hayes refused to provide his license and registration and insisted that Officer Bera call Spencer Police Chief David Darrin ("Chief Darrin") to the scene.^{1/} Officer Bera asked again for Hayes' license. Hayes refused and said, "No, get your chief down here now." Officer Bera told Hayes he was risking arrest by refusing to provide his license. Hayes said, "You do whatever you think you need to. If your chief is in right now, I want him down here."

5. Officer Bera used the radio in his police cruiser to contact the police station. Officer Bera advised Chief Darrin that Hayes was refusing to produce his license until he could speak to the chief at the scene. Chief Darrin agreed to come to the scene.

6. Officer Bera asked Hayes to wait in his vehicle until the chief arrived. Hayes refused. Officer Bera told Hayes that Chief Darrin would be on the scene within one minute.

7. When Chief Darrin arrived, Hayes told him, "Your officers are harassing citizens." Chief Darrin told Hayes to give his license and registration to Officer Bera. Hayes told Chief Darrin he was a member of the BOS.

8. Chief Darrin told Officer Bera to write Hayes a warning for speeding and for failure to have his license and registration in his possession. If Chief Darrin had not intervened, Officer Bera would have arrested Hayes for refusing to provide his driver's license and issued Hayes a citation for speeding.

9. Although Hayes did not explicitly ask Chief Darrin for special consideration, Chief Darrin concluded, based on all the circumstances, that Hayes was, in effect, asking for special treatment based on his being a selectman.

10. Officer Bera left the scene and Chief Darrin tried to calm down Hayes.

11. If Officer Bera had not made the citation a warning, Hayes' total fine could have been \$240 (plus cost of release from custody should he have been arrested for refusing to provide a license).^{2/}

12. Hayes asserts that he made the remarks to the police officers out of frustration^{3/} and that he did not intentionally attempt to use his selectman position to avoid being issued a ticket.^{4/}

13. Section 23(b)(2) of G.L. c. 268A prohibits a municipal employee from knowingly or with reason to know using or attempting to use his position to obtain for himself or others an unwarranted privilege of substantial value which is not properly available to similarly situated individuals.

14. By citing his position as a selectman during his conversations with Chief Darrin and Officer Bera, and otherwise making it clear during those conversations that as a selectman, he did not expect to be arrested or issued a ticket, knowingly or with reason to know, Hayes used or attempted to use the power of his official position.

15. Under the circumstances, Hayes normally would have been arrested for refusing to show the officer his license and should have been issued a citation for speeding. Being able to avoid being arrested or issued a ticket under the above circumstances was an unwarranted privilege.

16. The potential penalties associated with the traffic citations described above were at least \$240; and, therefore, of substantial value.^{5/}

17. The privilege of not being arrested and/or issued a traffic citation under the circumstances as described above was not properly available to similarly situated individuals facing similar penalties, as it was not based on guilt or innocence or appropriate extenuating circumstances, but rather on Hayes' position as an elected official.

18. Thus, by knowingly or with reason to know, using his official position as a selectman to secure for himself the unwarranted privilege of avoiding arrest and/or the issuance of a traffic citation, Hayes violated G.L. c. 268A, §23(b)(2).

In view of the foregoing violations of G.L. c. 268A, the Commission has determined that the public interest would be served by the disposition of this matter without further enforcement proceedings, on the basis of the following terms and conditions agreed to by Hayes:

(1) that Hayes pay to the Commission the sum of one thousand (\$1,000.00) as a civil penalty for the violation of G.L. c. 268A, §23(b)(2); and

(2) that Hayes waive all rights to contest the findings of fact, conclusions of law and terms and conditions contained in this Agreement in this or any other related administrative or judicial proceeding to which the Commission is or may be a party.

DATE: December 2, 1999

1/Hayes, as a selectman, previously voted in favor of hiring and retaining Darrin as chief.

2/Bera wrote a warning for traveling 50 MPH in a 35 MPH zone (otherwise a \$100 fine); however, Bera could have written a citation for traveling 47 MPH in a 25 MPH zone. The fine for 47 MPH in a 25 MPH zone is \$170. The fine for no license in possession and registration in possession is \$70 (\$35 each). Therefore, Hayes could have been facing fines totaling \$240. In addition, Hayes' automobile insurance rates would increase as a result of the citations.

3/According to Hayes, prior to being stopped by the police, Hayes' truck in which he had been carrying trash broke down. Hayes had to transfer all the trash from the truck and place it in the car that he was driving when he was stopped. He was already in an excited and agitated state and the police detaining him added to his frustration which resulted in Hayes acting in the manner as described above.

4/Mr. Hayes maintains that he did not intend for his conduct to be perceived as an attempt to use his official position to secure any such unwarranted accommodation. The Commission previously addressed this point in *In the Matter of Richard Singleton*, 1990 SEC 476 (fire chief violates §23(b)(2) by telling a company's representative that certain fire department inspections could take forever while in the same conversation asking the company to maintain its business with his son). In *Singleton*, the Commission said, "General Laws c. 268A, §23(b)(2), however, embodies an objective test by which a public employee's conduct is judged by what the employee knew or had reason to know at the time of his conduct." See also *In the Matter of Galewski*, 1991 SEC 504 (assistant building inspector fined \$1,000 for violating §23(b)(2) by asking a developer, during the course of an inspection, whether the developer could build Galewski a house he could afford); Thus, even if Mr. Hayes did not know his conduct would be perceived as an attempt to secure an unwarranted privilege of substantial value, he had reason to know his conduct would be so perceived.

5/See *Commonwealth v. Famigletti*, 4 Mass. App. 584 (1976).